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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS A. MARTINEZ,

Defendant and Appellant.

D042573

(Super. Ct. No. SCD 163989)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed as modified.

Luis A. Martinez appeals a judgment entered after a jury convicted him of three counts each of kidnapping for ransom and kidnapping during a carjacking, two counts of kidnapping for robbery, and one count each of extortion and conspiracy to commit kidnapping for robbery, ransom or extortion, plus various enhancements. He contends (1) the jury improperly convicted him of multiple kidnapping counts against each of the three victims; (2) the trial court violated Penal Code section 654 (all statutory references are to this

code) for not staying the sentence on his extortion conviction; and (3) the court improperly imposed a parole restitution fine because he was not eligible for parole.

We agree the court should have stayed Martinez's sentence on the extortion count under section 654, and order the judgment be modified to stay that sentence. The People concede the third point and we agree it is appropriate to strike the parole restitution fine. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of November 14, 2001, Hoai Thanh D. and her two-year-old daughter, My Hien, met Hoai's coworker, Minh Thanh Nguyen, at a shopping center to purchase a birthday gift for their boss's daughter. Nguyen purchased an item and the group returned to Hoai's Honda to wrap the gift. A masked man holding a knife banged on the window and opened the driver's side door, while another masked individual knocked on the passenger side window and ordered Nguyen to open the door. Nguyen jumped out of the car, but another masked man stabbed him in the arm and forced him into the backseat next to My Hien's car seat. The person who had stabbed Nguyen got into the backseat along with Hoai, while two others got into the front seats.

One of the men, later identified as Martinez, drove the car while someone took Hoai's purse and Nguyen's wallet and jewelry. Martinez and another person asked Nguyen for the personal identification number (PIN) to his ATM card. When Nguyen told them that he could not remember the number, two of the men beat him with their fists and poked him with knives until Nguyen gave them a number. When the code did not work, all of the men beat Nguyen and Martinez told Nguyen that his men would kill him if he did not give them the

correct PIN. Fearing for his life, Nguyen gave them the correct number and Martinez withdrew \$500 from Nguyen's account.

Martinez took Hoai and My Hien to a motel on El Cajon Boulevard, which he had checked into under his own name. Before leaving, Martinez lifted his mask and showed Hoai his face. Another man inside the room robbed Hoai and My Hien of their jewelry and then raped Hoai. Meanwhile, Martinez and another man drove Nguyen to another location and demanded the PIN to his credit card. They beat Nguyen after he claimed that he could not remember the number. Nguyen gave them a number and one of the men withdrew \$260 from an ATM, but they were unsuccessful in withdrawing additional amounts. The men took Nguyen back to the motel room, where he eventually fell asleep.

The following morning, Martinez informed the motel's office that he wanted to stay an extra night. After allowing Nguyen to shower, Martinez threatened to cut off Nguyen's penis if he did not reveal his credit card PIN. Three men then beat Nguyen. The next morning, Martinez drove his victims to another motel where he had again checked in under his own name. On the motel registration form, Martinez listed his car as a Pontiac, but gave the license plate number of Hoai's Honda.

Eventually, the men took their victims to Nguyen's vehicle and Martinez asked for directions to Hoai's house. On the way there, Martinez had Hoai telephone her father, Mr. D., to tell him that she was being held and that he needed to pay for her release. Mr. D. borrowed \$6,000 from friends and received a telephone call to arrange the exchange. Martinez released Hoai and My Hien after he received the money and Mr. D. picked them up and took them home, where the police were waiting.

Martinez and his associates then took Nguyen to Mexico and took pictures of Nguyen to send to Nguyen's family. Martinez left Nguyen with the other captors and, late that evening, police arrested him as he tried to cross the border from Mexico while driving Hoai's Honda. During a police interview, detectives questioned Martinez about Nguyen's whereabouts and Martinez agreed to call his cohorts from an unmonitored pay phone. Early the following morning, Mexican authorities pulled over Nguyen's vehicle, found Nguyen and detained the other occupants.

The district attorney charged Martinez with three counts each of kidnapping for ransom with bodily harm (counts 1, 2 & 5); kidnapping during a carjacking (counts 7, 8 & 9); kidnapping for robbery (counts 3, 4 & 6); and one count each of torture (count 10), extortion (count 11) and conspiracy to commit kidnapping for robbery, ransom or extortion (count 12); plus various enhancements. The trial court later granted Martinez's motion to dismiss counts 4 and 10, the bodily harm allegations as to counts 1 and 2, the use of a weapon allegations as to count 2, and the great bodily injury allegations as to counts 5, 6 and 9. A jury found Martinez guilty of the remaining charges and enhancements and the trial court sentenced him to life without the possibility of parole as to count 5, consecutive terms of life with the possibility of parole as to counts 1 and 2, a consecutive three-year term as to count 11, and a consecutive one-year term for the weapon enhancement as to count 1. The trial court stayed the terms as to counts 3, 6, 7, 8, 9 and 12, the weapon enhancements as to counts 3 and 7, and the bodily harm enhancement as to count 5. (§ 654.)

DISCUSSION

Multiple Kidnapping Convictions

Martinez was convicted of three counts each of kidnapping for ransom with bodily harm (counts 1, 2 & 5), kidnapping during a carjacking (counts 7, 8 & 9), and two counts of kidnapping for robbery (counts 3 & 6). The trial court sentenced him on counts 1, 2, and 5 (one sentence for each victim), and stayed sentence under section 654 on the remaining five kidnapping counts. Martinez contends that he may properly be convicted of only one kidnapping count as to each victim, and that the five remaining kidnapping convictions must be reversed because the kidnapping of each victim constituted a single continuous act with a single intent and objective that could not be fragmented into multiple kidnapping convictions. We disagree.

An accusatory pleading may charge multiple offenses "connected together in their commission" and a "defendant may be may be convicted of any number of the offenses charged." (§ 954.) Stated differently, "[s]ection 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct." (*People v. Pearson* (1986) 42 Cal.3d 351, 354 (*Pearson*).) The one exception to this rule is "that multiple convictions may not be based on necessarily included offenses. [Citations.]" (*Id.* at p. 355.) However, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) In *Pearson*, our high court recognized the problem of permitting multiple convictions under

section 954 while protecting the defendant from multiple punishment, and solved the problem by generally permitting multiple convictions "on counts that arise from a single act or course of conduct," but "staying execution of sentence on all but one of those convictions." (*People v. Ortega* (1998) 19 Cal.4th 686, 692, citing *Pearson, supra*, 42 Cal.3d at p. 360.)

Here, Martinez does not argue that the three different kidnapping counts are lesser included offenses of each other. In fact, this court has previously rejected the argument that kidnapping for robbery and kidnapping for ransom are the same crime or necessarily included offenses because they involve different elements and statutes. (*People v. Wiley* (1994) 25 Cal.App.4th 159, 162-163.) Specifically, kidnapping for ransom (§ 209, subd. (a); CALJIC No. 9.53) requires the specific intent to hold or detain that person for ransom, while kidnapping for robbery (§ 209, subd. (b)(1); CALJIC No. 9.54) requires the specific intent to commit robbery, and kidnapping during the commission of a carjacking (§ 209.5, subd. (a); CALJIC No. 9.54.1) requires a kidnapping with the specific intent to facilitate the commission of a carjacking. Thus, the multiple convictions were proper because they involved different elements of proof and the trial court adopted the correct approach by imposing sentence on one kidnapping conviction as to each victim and stayed the sentence as to the remaining kidnapping convictions.

Martinez also claims there is no evidence from which it can be reasonably inferred that he had separate intents and plans; however, he does not challenge the sufficiency of the evidence supporting his convictions. Moreover, the trial court expressly instructed the jury that Martinez must have acted with the specific intent to commit each of the three

kidnapping crimes and we presume that the jury read and understood these instructions (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1369-1370) and found that Martinez harbored the specific intent to commit each crime. (*People v. Reilly* (1970) 3 Cal.3d 421, 425 [We must "presume in support of the judgment the existence of every fact the [jury] could reasonably deduce from the evidence."].)

Furthermore, there was substantial evidence from which a reasonable trier of fact could have found Martinez guilty of each of the eight kidnapping counts. Martinez completed the kidnapping for carjacking (counts 1, 3 & 5) when he and his cohorts forced their way into Hoai's vehicle. After driving for a period of time the individuals robbed Hoai and Nguyen, completing the kidnapping for robbery of these victims (counts 3 & 6). Martinez then left Hoai and My Hien under guard in motels for about three days, until he retrieved them to commence the kidnapping for ransom (counts 1 & 2). Finally, Martinez moved Nguyen to Mexico and took photographs of Nguyen to send to Nguyen's family (count 5, kidnapping for ransom). (*People v. Anderson* (1979) 97 Cal.App.3d 419, 425 ["The crime of kidnapping for ransom is complete when the kidnapping is done for the specific purpose of obtaining ransom even though the purpose is not accomplished."].)

While Martinez cites a number of cases standing for the proposition that kidnapping is a continuing offense that does not require a unanimity instruction where there is one uninterrupted detention, these cases do not stand for the proposition that a defendant cannot be convicted of multiple kidnapping-related crimes where the defendant harbored multiple objectives during the uninterrupted detention, an assertion we have previously rejected. (*People v. Wiley, supra*, 25 Cal.App.4th at pp. 163-164.) Finally, *People v. Thomas* (1994)

26 Cal.App.4th 1328 is distinguishable. In *Thomas*, the defendant abducted a single victim in her vehicle, robbed her of personal property and asked for her ATM card. (*Id.* at pp. 1331-1332.) After she responded that the card was at her apartment, the defendant took her there, but stopped along the way to sexually assault her. (*Ibid.*) The defendant was convicted of two counts of kidnapping to commit robbery, but the appellate court reversed one of the convictions on the ground that one continuous kidnapping supported only one count of kidnapping to commit robbery. (*Id.* at pp. 1334-1335.) The *Thomas* court never addressed the issue of whether these facts could support the elements of the different kidnapping-related counts at issue here.

Consecutive Sentence for Extortion

The trial court imposed consecutive life terms with the possibility of parole for Martinez's convictions of kidnapping Hoai and My Hien for ransom (count 1 & 2) and a consecutive three-year term for extortion of Hoai's father (count 11), reasoning that Martinez had committed separate acts of violence against separate victims and that section 654 did not require staying the term as to count 11. Martinez correctly contends that the trial court erred by not staying the sentence on count 11 under section 654.

Section 654 prohibits the imposition of multiple sentences where a single act or course of conduct pursuant to a single objective violates more than one statute. In such a situation, a defendant may be punished only for the more serious offense. (*People v. Diaz* (1967) 66 Cal.2d 801, 806.) This provision, however, does not bar multiple punishments where the act is one *of violence* against multiple victims (the multiple-victim exception). (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.) "Under this exception, "even though a

defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim." [Citations.] The reason for the multiple-victim exception is that "when a defendant "commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons," his greater culpability precludes application of section 654.' [Citation.]" (*People v. Centers* (1999) 73 Cal.App.4th 84, 99, quoting *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.)

"[W]hether a crime constitutes an act of violence that qualifies for the multiple-victim exception to section 654 depends upon whether the crime (in conjunction with any allegations in enhancement) is defined to proscribe an act of violence against the person." (*People v. Hall, supra*, 83 Cal.App.4th at p. 1092.) The mere potential for violence is insufficient to qualify a crime as violent for purposes of the multiple-victim exception to section 654. (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024-1025; *People v. Hall, supra*, 83 Cal.App.4th at pp. 1091-1094.)

The jury found Martinez guilty of kidnapping Hoai for ransom through the use of a deadly weapon, which is a violent crime for purposes of the multiple-victim exception. (*People v. Centers, supra*, 73 Cal.App.4th at p. 100.) The jury also found him guilty of extortion against a different victim, Hoai's father. Extortion is defined as "the obtaining of property from another, with his consent, . . . induced by a wrongful use of force or fear" (§ 518.) The necessary fear "may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or, [¶] 2. To accuse the individual threatened, or any relative of his, or member of his family, of any

crime; or, [¶] 3. To expose, or to impute to him or them any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him or them." (§ 519.) Thus, by statutory definition, the fear necessary for extortion can be induced by nonviolent means (accusing an individual of a crime or exposing a disgrace or secret) or by violence or a threat of violence. (*Ibid.*)

The Attorney General points out that robbery (§ 211) and making a criminal threat (§ 422) are considered to be violent crimes to which the multiple-victim exception can apply because these crimes are accomplished by the creation of fear through threats of violence. (*People v. Champion* (1995) 9 Cal.4th 879, 934 [robbery], disapproved on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Solis*, *supra*, 90 Cal.App.4th at p. 1024 [criminal threat].) Respondent then reasons that extortion is also a violent crime because it can be committed by violent means and Martinez created fear in Mr. D., who was not a victim of the kidnapping.

However, the multiple-victim exception only applies to robbery and making a criminal threat because the defendant created the necessary fear by subjecting multiple victims to violence or threats of violence. (*People v. Champion*, *supra*, 9 Cal.4th at p. 934 [robbery committed against victims at two separate residences]; *People v. Solis*, *supra*, 90 Cal.App.4th at p. 1009 [two victims suffered fear after hearing criminal threats].) Here, although the captors threatened to torture My Hien if Mr. D. did not pay the ransom, Martinez committed no act of violence or threat of violence against Mr. D. Accordingly, the multiple-victim exception does not apply and the trial court erred by not staying the sentence on count 11 under section 654.

Parole Restitution Fine

In sentencing Martinez the trial court also imposed a suspended \$10,000 parole restitution fine under section 1202.45. Martinez asserts, and the People concede, that such a fine may not be imposed if there is no parole eligibility. (*People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1181-1186.) Since Martinez was sentenced to life without the possibility of parole on count 5, he is not eligible for parole. Accordingly, we modify the judgment by striking the fine. (§ 1260.)

DISPOSITION

The \$10,000 parole restitution fine imposed under section 1202.45 is stricken. The judgment is modified to stay imposition of sentence on count 11. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the modifications and to forward a certified copy of the amended abstract to the Department of Corrections.

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.